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In the Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

DOUGLAS DEWEY AND
WAUKESHA LIME AND STONE COMPANY

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), violates the Fourth Amendment insofar as it authorizes representatives of the Secretary of Labor to conduct warrantless safety and health inspections of stone quarries.

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OPINIONS BELOW

The main opinion of the district court (App. A, *infra*, 1a–6a), as amended sua sponte (App. C, *infra*, 8a, 10a), is reported at 493 F. Supp. 963. The opinion of the district court denying a motion by the Secretary of Labor to alter or amend the judgment (App. D, *infra*, 11a–12a) is not reported. The opinions of the district court at the preliminary injunction stage (App. E, *infra*, 13a–16a; App. F, *infra*, 17a–19a) are also not reported.

JURISDICTION

The judgment of the district court was entered on July 15, 1980 (App. B, *infra*, 7a), and was amended sua sponte on July 22, 1980 (App. C, *infra*, 9a). The district court denied the Secretary of Labor's motion to alter or amend the judgment on August 11, 1980 (App. D, *infra*, 11a–12a). The Secretary filed a notice of appeal to this Court on September 9, 1980 (App. G, *infra*, 20a). On October 30, 1980, Justice Stevens extended the time in which to docket the appeal to and including December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Williams* v. *Zbaraz*, No. 79–4 (June 30, 1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. a. Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), provides:

> Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investiga-

tions in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary [of Labor] shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary [of Labor] shall develop guidelines for additional inspections of mines based on criteria including but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

b. Section 108(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 818(a)(1), provides:

> The Secretary [of Labor] may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate

order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—

> (A) violates or fails or refuses to comply with any order or decision issued under this chapter,
>
> (B) interferes with, hinders, or delays the Secretary [of Labor] or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter,
>
> (C) refuses to admit such representatives to the coal or other mine,
>
> (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occuring in, or connected with, such mine,
>
> (E) refuses to furnish any information or report requested by the Secretary [of Labor] or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or
>
> (F) refuses to permit access to, and copying of, such records as the Secretary [of Labor] or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter.

STATEMENT

On July 10, 1978, Walter Brey, an authorized representative of the Secretary of Labor, attempted to inspect the quarry and mill operated by appellee Waukesha Lime and Stone Company in Waukesha, Wisconsin (App. E, *infra*, 13a).[1] The inspection was attempted pursuant to Section

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[1] Waukesha's operation covers 300 acres and employs 30 full-time workers. The work in the quarry is above ground and involves the use of explosives to dislodge pieces of rock from the quarry wall. The rock is then transported by loaders to a crushing facility where it is reduced to different grades of limestone. Deposition of Douglas Dewey, at 6–10, 21 (Aug. 8, 1979).

103(a) of the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. (Supp. II) 813(a). The purpose of the inspection was to determine whether Waukesha had corrected a violation discovered by Brey during an earlier inspection under the Act (App. E, *infra*, 13a).[2] Waukesha's president, Douglas E. Dewey, refused to permit Brey to inspect the facility without a search warrant. Brey thereupon issued a citation to Waukesha for denial of entry, pursuant to Section 104(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 814(a).[3]

On February 23, 1979, the Secretary filed this civil action against appellees Dewey and Waukesha in the United States District Court for the Eastern District of Wisconsin, pursuant to Section 108(a)(1) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818(a)(1). The Secretary's complaint sought injunctive relief barring appellees from refusing to permit warrantless inspections of the Waukesha quarry

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[2] Following an inspection of Waukesha's facility in April 1978, Brey issued 25 citations for violations of mandatory health and safety standards (App. E, *infra*, 13a). The July 10 inspection was specifically designed to ascertain whether Waukesha had sufficiently reduced the exposure of one of its employees to silica-bearing dust (*ibid.*). An earlier inspection, conducted in September 1975 after the work-related death of one of Waukesha's employees, had resulted in the issuance of two notices of safety violations (*ibid.*).

[3] The Mine Safety Act provides that the Secretary shall issue citations and propose civil penalties for violations of the Act or of any mandatory health and safety standard promulgated under the Act. 30 U.S.C. (Supp. II) 814(a), 820(a). When an operator contests a citation, the Act provides for a hearing before an administrative law judge, whose decision is subject to discretionary review by the Federal Mine Safety and Health Review Commission. 30 U.S.C. (Supp. II) 815(d), 823(d). The operator is entitled to review of the final administrative decision as of right in the court of appeals. 30 U.S.C. (Supp. II) 816.

In this case, the Secretary's proposed civil penalty of $1,000 was upheld by an administrative law judge. Waukesha's petition for review of the administrative law judge's decision was granted, and its challenge to the validity of the proposed penalty is currently under submission to the Federal Mine Safety and Health Review Commission. *Waukesha Lime and Stone Co., Inc.* v. *Secretary of Labor*, FMSHRC Docket No. VINC 79-66-PM.

and mill under the Mine Safety Act. In their response to the complaint, appellees sought an injunction requiring the Secretary to obtain a search warrant prior to inspecting Waukesha's facilities.

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of appellees, holding that Section 103(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 813(a), is unconstitutional insofar as it authorizes warrantless inspections of stone quarries (Apps. A–C, *infra*, 1a–10a).[4] The district court observed that this Court has permitted warrantless searches of commercial establishments in certain regulated industries (App. A, *infra*, 1a, citing *United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 73 (1970) (liquor)), and that several courts of appeals have specifically upheld the constitutionality of warrantless inspections of stone quarries and sand pits pursuant to the Mine Safety Act (App. A, *infra*, 2a–4a). Nevertheless, relying on language in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the district court concluded that warrantless administrative searches are not constitutionally permissible except in industries that have had a long tradition of governmental regulation (App. A, *infra*, 2a). Because stone quarries were not subjected to extensive federal regulation until 1966, the court ruled that such quarries have not had a sufficiently lengthy regulatory history to allow warrantless inspections under the *Biswell-Colonnade* exception to the Fourth Amendment's warrant requirement (*id.* at 5a–6a).

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[4] In its initial opinion, the district court cited Section 108 of the Mine Safety Act, 30 U.S.C. (Supp. II) 818, which authorizes the Secretary to seek injunctions to enforce the Act, as the provision it found unconstitutional (App. A, *infra*, 6a). The court thereafter amended its opinion and judgment to reflect the fact that its decision was limited to holding unconstitutional only Section 103(a) of the Act, 30 U.S.C. (Supp. II) 813(a), the warrantless inspection provision (App. B, *infra*, 8a–10a; see also App. C, *infra*, 11a–12a).

The district court had previously denied the Secretary's and appellees' motions for a preliminary injunction (Apps. E and F, *infra*, 13a–19a).

THE QUESTION IS SUBSTANTIAL

The district court has held that Section 103(a) of the Mine Safety Act is unconstitutional insofar as it authorizes warrantless inspections of stone quarries. The decision below, if permitted to stand, will seriously impair effective implementation of federal legislation designed to protect the health and safety of workers in an industry that Congress has found to be among the most hazardous in the nation. The decision is inconsistent with this Court's rationale in *United States* v. *Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and is in direct conflict with the holdings of three courts of appeals that have sustained the constitutionality of the warrantless inspection provision of the Act in similiar factual contexts. *Marshall* v. *Texoline Co.*, 612 F.2d 935 (5th Cir. 1980) (gravel pit); *Marshall* v. *Nolichuckey Sand Co., Inc.*, 606 F.2d 693 (6th Cir. 1979), cert. denied, No. 79-1204 (Apr. 21, 1980) (sand and gravel pit); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (processing plant separating sand and gravel from coal-like substance). Accordingly, review by this Court is warranted.

1. In *Colonnade Catering Corp.* v. *United States*, *supra*, this Court considered the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. After reviewing the history of federal regulation in the area of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and "has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U.S. at 76. Accordingly, the Court unanimously ruled that the Fourth Amendment did not bar warrantless inspections to enforce the liquor laws. However, the Court held that the particular inspection was beyond the scope of the statute because Congress had not expressly authorized forcible entries without a warrant, but instead had made it an offense for a licensee to refuse admission to an inspector. *Id.* at 77.

Thereafter, in *United States* v. *Biswell*, *supra*, the Court upheld the warrantless search provisions of the Gun Control Act of 1968, 18 U.S.C. 923(g), despite the fact that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is government control of the liquor industry ***." 406 U.S. at 315. The Court noted that regulation of firearms traffic was of "central importance to federal efforts to prevent violent crime" and that inspection was "a crucial part of the regulatory scheme." *Ibid.* In addition, the Court observed that warrantless inspections were reasonable under the Fourth Amendment because they were essential to proper enforcement of the law, and that inspections under the Gun Control Act posed only limited threats to firearms dealers' justifiable expectations of privacy. *Id.* at 316. In light of these considerations, the Court concluded that "where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *Id.* at 317.

Although the district court in this case recognized that warrantless searches of business premises are constitutionally permissible in certain circumstances, it concluded, in reliance on language in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), that the administrative search exception to the warrant requirement is applicable only in those industries that have a long tradition of governmental regulation. This conclusion is based on a misreading of this Court's decision in *Barlow's* and is directly contrary to the decision in *Biswell*.

Barlow's involved the constitutionality of warrantless searches under the Occupational Safety and Health Act of 1970. While it is true, as the district court noted (App. A, *infra*, 2a), that the Court in *Barlow's* referred to a "long tradition of close government supervision" (436 U.S. at 313) as one factor distinguishing between enterprises that may be inspected without a warrant and those that may not, this statement was not intended to be exhaustive.

Rather, the Court also expressly reaffirmed the exception to the warrant requirement for statutorily authorized warrantless searches of " 'pervasively regulated business[es],' " typified by *Biswell* (firearms), and explained that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade * * *. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313, quoting from *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973).[5] In view of the fact that *Biswell* upheld warrantless searches in an industry that had not had a lengthy history of governmental regulation and that the decision in *Biswell* was cited approvingly in *Barlow's*, it is clear that the district court erred in concluding that warrantless inspections of stone quarries under the Mine Safety Act could not be sustained merely because quarries have not had a long tradition of federal regulation.

Moreover, although *Barlow's* refused to extend the exception for pervasively regulated businesses to all industries covered by the Occupational Safety and Health Act, the Court emphasized that its decision was limited to OSHA searches and that the reasonableness of warrantless inspections under other regulatory statutes would "depend upon the specific enforcement needs and privacy guarantees of each statute" (436 U.S. at 321). In particular, the Court recognized that "[s]ome * * * statutes * * * apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply" (*id.* at 321). The Court specifically cited the predecessor statutes of the Mine Safety Act as examples of regulatory schemes that were sufficiently distinguishable from OSHA that their constitutional validity would not be placed in question by the holding in *Barlow's* (*id.* at 321–322 n.18).

[5] As the Court similarly observed in *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979), "[t]here are certain relatively 'unique circumstances' * * * in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise." See also *United States* v. *Biswell*, *supra*, 406 U.S. at 316.

Three courts of appeals have examined the enforcement needs and privacy guarantees of the Mine Safety Act and have concluded, contrary to the district court in this case, that warrantless searches of stone quarries or similar facilities are not invalid under this Court's decision in *Barlow's*. *Marshall* v. *Texoline Co.*, *supra*; *Marshall* v. *Nolichuckey Sand Co., Inc.*, *supra*; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*. In addition, the Fourth Circuit has upheld the constitutionality of a warrantless inspection under the Act of an owner-operated coal mine. *Marshall* v. *Sink*, 614 F.2d 37 (1980).[6]

These courts of appeals have recognized that there are significant differences between the statutory scheme in *Barlow's* and the statutory scheme involved in the instant case. See *Marshall* v. *Texoline Co.*, *supra*, 612 F.2d at 937; *Marshall* v. *Nolichuckey Sand Co., Inc.*, *supra*, 606 F.2d at 695–696; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594. See also *Marshall* v. *Sink*, *supra*, 614 F.2d at 38–39. As these courts have observed, the Mine Safety Act, unlike OSHA, applies to a single industry with an acknowledged history of serious accidents and unhealthful working conditions; the inspection provisions of the Mine Safety Act are more narrowly drawn

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[6]Prior to *Barlow's*, in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973), a three-judge court upheld warrantless searches of coal mines pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq*.

We note that the Ninth Circuit recently held, in *Marshall* v. *Wait*, 628 F.2d 1255 (1980), that a small, decorative rock quarry, family owned and operated since the turn of the century, could not constitutionally be subjected to warrantless inspections under the Mine Safety Act. In the special circumstances of that case, the court concluded that the owners had not impliedly consented to warrantless inspections and thus had a reasonable expectation of privacy from warrantless governmental intrusions (*id*. at 1259). The court explicitly declined to rule on the facial constitutionality of the Act's inspection provision (*id*. at 1258).

The question presented in this case is also raised in two appeals that are pending before the Tenth Circuit. *Marshall* v. *Wallach Concrete Products, Inc.*, No. 80–1334; *Marshall* v. *Rose Gravel Co.*, No. 80–1027.

than those of OSHA; and there is less likelihood of the abuses of "unbridled discretion of executive and administrative officers" that the Court in *Barlow's* found objectionable. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323.

2. The decisions of these courts of appeals are correct because, as we now demonstrate, the warrantless safety inspection provisions of the Mine Safety Act meet the Fourth Amendment's standard of reasonableness. Here, as in *United States* v. *Biswell*, *supra*, 406 U.S. at 317, warrantless inspections are expressly authorized by statute, "regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions."

a. Because of the dangerous working conditions in the nation's mines, the failure of mine operators to correct hazardous conditions, and the substantial damage to society and to interstate commerce resulting from mine-related accidents, the federal government has a valid and overriding interest in the health and safety of the nation's miners. "Large interests are at stake, and inspection is a crucial part of the regulatory scheme" (*United States* v. *Biswell*, *supra*, 406 U.S. at 315), because it helps to insure that miners are not subjected to unduly hazardous conditions.

In subjecting the coal mining industry to pervasive regulation, Congress long ago recognized the particular dangers involved in mining. See *United States* v. *Consolidation Coal Co.*, 560 F.2d 214, 220 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, reaffirmed on remand, 579 F.2d 1011 (1978), cert. denied, 439 U.S. 1069 (1979). The health and safety of miners in other extractive industries first came under federal regulation in 1966, with the passage of the Federal Metal and Nonmetallic Mine Safety Act (Metal Act), 30 U.S.C. 721 *et seq.* In its report on the Metal Act, the Senate Committee cited a report by the Mine Safety Study Board concerning conditions in the metal and non-metallic mining industry. The study board found that, of 270 men killed in mining accidents in an 18-month span, approximately half were classified as the

victims of inadequate supervision or hazardous conditions that were within the power of mine operators to correct, including failure to provide safety devices, defective equipment, roof collapses and inadequate ventilation. S. Rep. No. 1296, 89th Cong., 2d Sess. 2-3 (1966). In rejecting several amendments to exclude sand, gravel and crushed stone operations from coverage under the Metal Act, the Senate Committee observed that the available statistics concerning injury frequency and severity "conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries." *Id.* at 7.

The Mine Safety Act was enacted in 1977, when Congress combined regulation of all mines under one statute and placed inspection control in the hands of the Secretary of Labor. Pub. L. No. 95-164, 91 Stat. 1290 *et seq.* This enactment repealed the Metal Act and amended the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), 30 U.S.C. 801 *et seq.*, to include mines previously covered under the Metal Act.[7]

The extent of federal regulation under the Mine Safety Act is far-reaching and pervasive. The Secretary of Labor is directed to develop detailed mandatory safety and health standards for all mines for the protection of life and prevention of injuries. 30 U.S.C. (Supp. II) 811. Representatives of the Secretary are empowered and required to inspect all mines frequently in order to obtain and disseminate safety and health information, investigate accidents, and monitor compliance with safety and health standards (30 U.S.C. (Supp. II) 813), to issue and enforce citations for failure to follow safety and health standards (30 U.S.C. (Supp. II) 814), and to order that all miners be

[7]The Mine Safety Act defines "coal or other mine" to include "an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground." 30 U.S.C. (Supp. II) 802(h)(1). Both the Metal Act and the Coal Act contained right to entry inspection provisions virtually identical to Section 103(a) of the Mine Safety Act. See 30 U.S.C. 724; 30 U.S.C. 813(b)(1). Both Acts also had injunctive procedures virtually identical to Section 108(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818. See 30 U.S.C. 733(a); 30 U.S.C. 818.

withdrawn immediately from affected areas when imminently dangerous conditions are found to exist (30 U.S.C. (Supp. II) 817).

Congress enacted the Mine Safety Act because of its concern that previous legislation had not provided sufficient protection to miners. The Senate Committee report listed several mining accidents in recent years that had taken the lives of 260 people and noted that:

> [D]espite * * * considerable Congressional attention, our nation still experiences deaths and serious injuries in our mines at a rate which casts shame on an advanced, industrialized society. Every working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries in our nation's mines.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 4 (1977). In addition, the statement of congressional purpose in the Act reflects Congress' recognition of the urgent need to improve mine working conditions and of the disruptive effects of mining accidents on miners, their families and the nation's commerce. 30 U.S.C. (Supp. II) 801.

Congress specificially found that the rate of injury in the mining industry greatly exceeded the average of all industries regulated under the Occupational Safety and Health Act.[8] Because of the alarming health and safety statistics present throughout the entire mining industry, Congress reasonably concluded that all miners, whether coal, metal, or non-metal, must have access to equal and uniform enforcement of the federal mine safety and health laws. H.R. Rep. No. 95-312, *supra*, at 8; 123 Cong. Rec. 19925 (1977)

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[8]The Senate Committee reported that:

> [F]atalities and disabling injuries in our nation's mines are still unacceptably and unconscionably high. According to the 1974 Annual Report on Occupational Safety and Health, the incidence of work related injuries and illnesses for miners exceeded the "all-industry" rate by about 14 percent. * * * [Moreover], "about one out of every 1500 mine workers * * * was killed on the job or died from work related injuries or illnesses in 1973, compared with one out of every 12,400 for all workers covered by OSHA."

S. Rep. No. 95-181, *supra*, at 7; see also H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 1 (1977).

(remarks of Sen. Williams); *id.* at 20002-20003 (remarks of Sen. Williams); *id.* at 20008 (remarks of Sen. Javits).

b. Warrantless inspections are essential "if the law is to be properly enforced and inspection made effective * * *." *United States* v. *Biswell*, *supra*, 406 U.S. at 316. Congress determined that frequent, unannounced, on-site inspections are necessary in order to enforce compliance with the safety and health standards to be developed by the Secretary of Labor. Under the Mine Safety Act, each underground mine in the nation is to be inspected in its entirety at least four times annually, and all surface or other mines, including stone quarries, are to be inspected at least twice annually. 30 U.S.C. (Supp. II) U.S.C. 813 (a).[9]

Congress left no doubt that these inspections are to be accomplished without the use of a warrant. Section 103(a) of the Mine Safety Act absolutely prohibits the giving of advance notice of inspections to determine whether an imminent danger exists or whether the facility is in compliance with the mandatory health and safety standards of the Act. Moreover, Section 103(a) provides that the Secretary's representative "shall have a right of entry to, upon, or through any coal or other mine" for the purpose of conducting an inspection under the Act. The Senate Committee report explicitly stated Congress' intention "to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act *without first obtaining a warrant*." S. Rep. No. 95-181, *supra*, at 27 (emphasis added).

Congress has thus instituted an extensive warrantless inspection program to protect against mine hazards and disasters. A warrant requirement would seriously under-

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[9] In addition, for mines that liberate excessive amounts of explosive gases, the Secretary is required to inspect once every five days at irregular intervals. 30 U.S.C. (Supp. II) 813(i). In fiscal year 1979, the latest complete year for which statistics are available, there were 20,061 mines subject to the Mine Safety Act. Of those, 206 are considered gassy and, therefore, are inspected once every five days. In fiscal year 1979, there were 1,978 federal inspection personnel, who performed 114,032 inspections and investigations.

mine the ability of the Secretary to carry out his responsibilities under the Mine Safety Act. If a warrant were required, the Secretary could choose to obtain warrants prior to all inspections. However, this approach would require the Secretary to prepare a warrant application and to submit the application to a magistrate each time he is required by statute to conduct an inspection. As a result, the Secretary, the United States Attorneys (see 30 U.S.C. (Supp. II) 822) and the federal courts would be overburdened, and the purpose of the Mine Safety Act—protection of miners—would be frustrated, by the huge volume of paperwork that would be generated in order to obtain warrants authorizing the more than 100,000 mine inspections that are performed annually (see note 9, *supra*).

On the other hand, if the Secretary initially seeks to inspect with the consent of the mine operator, the operator could simply refuse entry until a warrant is obtained, in order to take cosmetic safety steps before the inspector returns, and could then revert to unsafe practices after the inspector departs. Congress was well aware of this possibility and therefore mandated that all mines be subject to unannounced inspections. The Senate Committee report explained that:

> [I]n view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.
>
> The Committee has specifically adopted the prohibition on advance notice of inspections which is currently the rule under the Coal Act, and rejects the provision of the Metal Act which permits such advance notice.

S. Rep. No. 95-181, *supra*, at 27. Hence, either approach—the use of a warrant in every case, or the obtaining of a warrant when an operator refuses to admit an inspector who arrives at an inopportune time—would seriously impede the Act's enforcement program.

c. Warrantless inspections under the Mine Safety Act pose only a minimal threat to any reasonable expectations

of privacy that mine operators may have. The Act has built-in protections to insure that the power of warrantless entry will not be abused, and the occurrence and frequency of inspections are not left entirely to the unfettered discretion of inspectors in the field. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323; cf. *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979).

Congress has mandated that regular inspections be conducted as a critical part of the safety and health standards enforcement mechanism and has specified the minimum number of annual inspections. 30 U.S.C. (Supp. II) 813(a). In addition, operators of mines must be familiar with the safety and health standards of the Mine Safety Act and thus are presumed to have full knowledge of the inspector's task and his authority to inspect. These factors were relied on by this Court in *Biswell* in upholding a warrantless search (406 U.S. at 316), and they also led the court in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 51 (S.D. Ohio 1973) (three-judge court), to hold that warrantless inspections under the Coal Act were reasonable. The inspections conducted under the Mine Safety Act are thus materially different from those disallowed in *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), or *See* v. *City of Seattle*, 387 U.S. 541 (1967). In those cases, the Court found that the occupant of a home or owner of a commercial building had no way of knowing whether enforcement of a municipal code involved inspection of his premises, whether inspectors were authorized to search, or whether the search exceeded the limits of the inspection powers. See *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 323.

The Mine Safety Act prohibits forcible entries and thus provides a mine operator with an opportunity to obtain immediate judicial review of any special privacy claims it wishes to assert. See *Marshall* v. *Texoline Co.*, *supra*, 612 F.2d at 937-938; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594. When a mine operator refuses to allow an inspection, the Secretary is authorized by 30 U.S.C. (Supp. II) 818(a)(1) to file a civil action in federal district court to enjoin future denials of entry, as

was done in the instant case. The district court in issuing the injunction may take steps to accommodate any unusual privacy expectations asserted by the mine operator. In *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594, for example, the district court imposed on the federal inspectors a confidentiality requirement in order to protect the mine operator's trade secrets.[10]

In contrast to the injunction procedure under the Act, imposition of a warrant requirement would not provide any significant protection to those mine operators who might wish to assert unusual privacy claims. This is so because, in the administrative search context, "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 320, quoting from *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538 (footnote omitted). Here, as in *Biswell*, "if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible." 406 U.S. at 316. Hence, adding a warrant requirement would gain the operators little, but would seriously impede enforcement of the Mine Safety Act.

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[10] As we have previously noted, (see note 7, *supra*), 30 U.S.C. (Supp. II) 818(a)(1) had predecessors in both the Coal and Metal Acts. The injunction provisions of these Acts were cited favorably by this Court in *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 321 & n.18, as statutes specifically authorizing "resort to federal-court enforcement when entry [for inspection] is refused * * * ."

In light of the overwhelming governmental interest in protecting the lives and health of mine employees, the need for frequent, unannounced inspections of mines, and the minimal threat to the privacy interests of mine operators, we submit that warrantless inspections under the Mine Safety Act are reasonable under the Fourth Amendment.[11]

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[11] The opinion of the district court denying the government's motion to amend the judgment (App. D, *infra*, 11a–12a) clearly indicates that the judgment below is not based on the court's discussion, in its decision granting summary judgment for appellees (App. A, *infra*, 5a), regarding the civil penalty provision of the Mine Safety Act. There is, in any event, nothing in this provision that casts doubt on the validity of the Act. Under the Act, any penalty assessed by the Secretary is reviewable by an administrative law judge, by the Federal Mine Safety and Health Review Commission, and by a federal court of appeals. 30 U.S.C. (Supp. II) 815(d), 823(d)(2)(A), and 816. This scheme affords adequate protection against a wrongly assessed penalty. As noted earlier (see note 3, *supra*), Waukesha's challenge to the penalty assessed in this case is currently pending before the Mine Safety Review Commission.

Furthermore, the district court erred in concluding (App. A, *infra*, 5a) that the imposition of a penalty for frustrating a safety inspection "does not present a fair means for protecting privacy interests." Without such a penalty, mine owners would have no incentive to permit inspections without forcing the Secretary to obtain an injunction when inspecting each mine for the first time. Moreover, assessment of a $1,000 penalty, as in the present case, does not rise to the level of a penalty so "great that non-compliance and a judicial challenge cannot be risked." See *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

WILLIAM KANTER
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CARIN ANN CLAUSS
Solicitor of Labor

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CYNTHIA L. ATTWOOD
Attorneys
Department of Labor

DECEMBER 1980

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JULY 10, 1980

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

On March 9, 1979, after having heard oral argument, this Court denied plaintiff's motion for a preliminary injunction in which plaintiff sought to enjoin defendants from refusing to permit an agent of the Secretary of Labor to enter and inspect defendants' stone quarry. A formal memorandum and order denying the motion of the Secretary of Labor was signed on March 29, 1979. In that opinion, this Court found *sub silentio* that warrantless searches of stone quarries as authorized by Congress in the Federal Mine Safety and Health Act of 1977 (FMSHA), 30 U.S.C. § 801-960, violated their Fourth Amendment right to be free from such searches. The Secretary moved for reconsideration and in a memorandum and order dated May 30, 1979, the Court again denied the motion for a preliminary injunction.

In both memoranda, this Court recognized that in limited circumstances warrantless searches are permitted. *See United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

The Supreme Court's opinion in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) was relied upon extensively in the denial of the Secretary's motions. Quoting in part from that case, in the May 30, 1979 memorandum and order this Court stated:

> In *Barlow's* the Supreme Court articulated why warrantless searches are permissible in certain industries (e.g., liquor and firearms) by stating "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." The court further stated "the element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, Inc.*, 436 U.S. at 313.

Focusing on this language, this Court held that warrantless searches of stone quarries are not constitutionally permissible under FMSHA because such businesses do not have a long tradition of government regulation. It was found that federal regulation of stone quarries did not commence until 1966. *See* the May 30, 1979 memorandum and order at 3.

The Secretary has now moved for summary judgment in effect asking again for reconsideration of the denial of his motion for a preliminary injunction. Parenthetically, the Secretary is seeking relief under 30 U.S.C. § 818(a)(1)(C) which authorizes the Secretary to seek an injunction when a mine operator or his agent "refuses to admit [the Secretary's] representatives to the coal or other mine . . . ." Plaintiff seeks entry to conduct an inspection of possible safety violations by the defendants.

Subsequent to the May 30, 1979 memorandum and order, Judge Myron L. Gordon of this district in *Marshall v. Cedar Lake Sand & Gravel Co.*, No. 79-C-181 (E.D. Wis. Nov. 9, 1979) and three circuit courts, *Marshall v. Sink*, No. 77-2614 (4th Cir. Jan. 24, 1980) *Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693 (6th Cir. 1979), *cert. denied sub nom., Nolichuckey Sand Co. v. Marshall*, 48 U.S.L.W. 3678 (Apr. 21, 1980), and *Marshall v. Stoudt's*

Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), *cert. denied sub nom., Stoudt's Ferry Preparation Co. v. Marshall*, 48 U.S.L.W. 3435 (Jan. 7, 1980), have each found the preliminary injunction procedure outlined in FMSHA constitutional. In their opinion, warrantless searches of stone quarries and sand pits do not offend the constitution since these are pervasively regulated businesses.

In *Stoudt's Ferry* the court reached its decision by comparing FMSHA with the Occupational Safety and Health Act (OSHA). The court did this to determine the effect of the Supreme Court's holding in *Marshall v. Barlow's Inc.*, *supra*, that the warrantless provisions of OSHA were unconstitutional. The Court in *Stoudt's Ferry* held:

> Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding, 30 U.S.C.A. § 813(a). If the inspection is for obtaining or disseminating information about health and safety conditions, causes of accidents, or gathering of information about mandatory health and safety standards, the Secretary may give advance notice. *Id.*
>
> It may be seen that the Mine Safety inspection provision places limitations upon the purposes for which searches may be made, limits those in which no advance notice is given, and is more narrowly drawn than the comparable OSHA section. There is consequently less likelihood of the abuses of "unbridled discretion of executive and administrative officers" which *Barlow's* found objectionable. 436 U.S. at 323, 98 S.Ct. at 1825. Though *Barlow's* was not impressed with the importance of surprise inspections in the

> OSHA setting, we are not prepared to say that the legislative judgment as to their necessity in the context of mine safety is misplaced. *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d at 594.

The court was also impressed by the procedures provided for under 30 U.S.C. § 818, stating:

> Another significant difference between the statutes is that the Mine Safety Act provides for immediate judicial review by requiring the Secretary to secure an injunction in the district court if he is refused entry. 30 U.S.C.A. § 818. Any unusual privacy expectations may be fully explored in that proceeding and a reasonable accommodation may be achieved. *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d at 594.

In *Marshall v. Nolichuckey Sand Co., supra,* the court noted that the sand and gravel extraction industry has neither "the long history of regulation referred to in *Colonnade* [nor] the extensive licensing scheme which was present in both *Colonnade* and *Biswell.*" 606 F.2d at 695. However, the court found that the gravel industry, as recognized by Congress, exposes miners to "severe health and safety hazards." *Id.* Consequently, the court found the warrantless inspection provisions of FMSHA are reasonable.

In *Marshall v. Sink, supra,* the Fourth Circuit Court of Appeals echoed the themes of *Stoudt's Ferry* and *Nolichuckey Sand* noting the "overriding governmental interest in the safety of miners." No. 77-2614 at 5. It further held that "Congress has a legitimate interest in protecting all persons from these hazardous conditions as it does in protecting any employee in a large mine. *Id.* Finally, that court also noted that any privacy interests can be protected by the preliminary injunction procedure provided for in the statute.

It is important to note that in *Marshall v. Sink, supra,* the court found that the injunction procedure "permits the operator to present his objections to a district court before . . . any sanctions are imposed." The case before this Court, however, illustrates that just the opposite is true.

The preliminary injunction procedure may provide a method by which a gravel pit operator can have his privacy interests protected, but it is at a cost that, in reality, curtails the utilizations of such privacy expectations. In the case at bar, the inspector, Walter C. Brey, issued a citation for denial of entry when defendant's president, Douglas E. Dewey, refused to allow Brey to continue a safety inspection of the pit. (Plaintiff's brief of October 16, 1979, in support of its motion for summary judgment). This citation eventually resulted in a penalty of $1,000.00. (*Secretary of Labor, MSHA v. Waukesha Lime & Stone*, VINC 79-66 PM, A.O. No. 47-00235-05003 (June 5, 1979); letter of February 6, 1980 from Francis Croak defendants' attorney).

While the preliminary injunction proceedings may get the defendants into court to vindicate their constitutional rights, the cost to them is indeed quite high. It seems a strange procedure to impose such a burden on a citizen in order to enjoy the fruits of the Fourth Amendment which courts are enjoined to liberally construe, and to which all owe a duty of vigilance for its effective enforcement, lest there be an impairment of those very rights for which it was adopted. *Ker v. State of California*, 374 U.S. 23 (1963). This is a particularly high cost to pay to protect valid privacy claims. The mine operator must choose between protecting valid privacy interests or his pocketbook. In essence, the injunctive procedure does not present a fair means for protecting privacy interests.

As this Court previously opined, the exceptions which the Supreme Court has heretofore engrafted upon the warrant requirement (firearms and alcohol) present quite different situations from stone quarries. The *Biswell-Colonnade* exception involves businesses that are not only closely regulated, but also have a long history of such regulation. Although quarries have been in existence for thousands of years, only when Congress decided in 1966 to incorporate them within the Mine Safety Act did quarries become pervasively regulated in this country. Unlike firearms and alcohol, and to some extent coal mines, quarries have not had a long history of pervasive regulation.

Therefore, the regulation of quarries fails to meet the requirement of the *Biswell-Colonnade* exception to the Fourth Amendment rule requiring warrants for searches of private premises.

In light of the foregoing, this Court is persuaded that, without circuit precedent in point and with due regard to the basic constitutional issue at stake, it must adhere to its prior position, deny plaintiff's motion for summary judgment and grant summary judgment in favor of defendants on the basis that 30 U.S.C. § 818 is unconstitutional and thus unenforceable.

SO ORDERED this 10th day of July, 1980, at Milwaukee, Wisconsin.

ROBERT W. WARREN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUL 15, 1980

Civil Action File No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

JUDGMENT

This action came on for (hearing) before the Court, Honorable Robert W. Warren, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment,

It is Ordered and Adjudged that the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-960, in so far as they allow warrantless searches of stone quarries, is unconstitutional and thus unenforceable.

Approved: /s/ _____
ROBERT W. WARREN
U.S. Dist. Judge

Dated at Milwaukee, Wisconsin, this 15th day of July, 1980.

_____
RUTH W. LA FAVE
Clerk of Court

By /s/ _____
G. BUDELMAN
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JULY 22, 1980

Mr. Page H. Jackson
Office of the Solicitor
U.S. Dept. of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Mr. Francis R. Croak
Cook & Franke
660 E. Mason St.
Milwaukee, WI 53202

Re: *Secretary of Labor* v. *Douglas Dewey, et al.*, Case No. 79-C-114

Dear Counsel:

It has come to the Court's attention that there is a clerical error in the memorandum and order issued July 10, 1980 in regard to the above-entitled case.

The error appears in the last line, second paragraph, on the last page of the order. Enclosed please find a corrected last page, which should be substituted for the one previously sent, and a copy of the amended judgment.

Very truly yours,

/s/ _____
ROBERT W. WARREN,
U.S. District Judge

RWW/msb
cc. Mr. Alan H. Yamamoto
Mr. Joseph C. Niebler

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JULY 22, 1980

Civil Action File No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

AMENDED JUDGMENT

This action came on for (hearing) before the Court, Honorable ROBERT W. WARREN, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, denying plaintiff's motion for summary judgment

It is Ordered and Adjudged that 30 U.S.C. § 813(a) insofar as it allows warrantless searches of stone quarries, is unconstitutional and thus unenforceable.

Approved: /s/ _____
ROBERT W. WARREN
U.S. District Judge

Dated at Milwaukee, Wisconsin, this 22nd day of July, 1980.

_____
RUTH W. LA FAVE
Clerk of Court

By /s/ _____
N. BUDELMAN
Deputy Clerk

As this Court previously opined, the exceptions which the Supreme Court has heretofore engrafted upon the warrant requirement (firearms and alcohol) present quite different situations from stone quarries. The *Biswell-Colonnade* exception involves businesses that are not only closely regulated, but also have a long history of such regulation. Although quarries have been in existence for thousands of years, only when Congress decided in 1966 to incorporate them within the Mine Safety Act did quarries become pervasively regulated in this country. Unlike firearms and alcohol, and to some extent coal mines, quarries have not had a long history of pervasive regulation. Therefore, the regulation of quarries fails to meet the requirement of the *Biswell-Colonnade* exception to the Fourth Amendment rule requiring warrants for searches of private premises.

In light of the foregoing, this Court is persuaded that, without circuit precedent in point and with due regard to the basic constitutional issue at stake, it must adhere to its prior position, deny plaintiff's motion for summary judgment and grant summary judgment in favor of defendants on the basis that 30 U.S.C. § 813(a) is unconstitutional and thus unenforceable.

SO ORDERED this 10th day of July, 1980, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AUGUST 11, 1980

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

On July 30, 1980, the Secretary of Labor filed a motion to alter or amend or, in the alternative, to stay the judgment entered by this Court in the above-entitled action on July 15, 1980 and amended on July 22, 1980.

In the *memorandum and order* supporting its judgment, the Court held that regulations of stone quarries failed to meet the requirement of the *Biswell-Colonnade* exception to the Fourth Amendment rule requiring warrants for searches of private premises. [*See United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).] Consequently, the Court granted summary judgment in favor of the defendants on the ground that 30 U.S.C. § 813(a) is unconstitutional and thus unenforceable.

The Secretary's motion is based on eight grounds. The first six grounds are all directed to the propriety of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et. seq*. Since the Court's decision rested on the unconstitutionality of the right of entry pro-

vision (30 U.S.C. § 813(a)), the arguments relating to the propriety of the civil penalties do not set forth valid reasons for altering, amending or staying the judgment and must be denied.

The Secretary's seventh ground in support of its motion is that "this Court, to the extent that it distinguishes 'stone quarries' from other mines covered by the Act, fails to address the authority of Congress to make reasonable classifications in enacting legislation." (Plaintiff's motion, page 2.)

The Secretary's argument is without merit. In its opinion, the Court closely examined the long history of pervasive regulation which justified congressional action in the area of mines and found that stone quarries were not among the mines historically regulated. In reaching that decision, the Court implicitly held that the inclusion of stone quarries as a covered mine in the FMSHA was unreasonable. Consequently, the Secretary's motion to alter or amend the judgment on the ground that the Court failed to address the authority of Congress to make reasonable classification must be denied.

Finally, the Secretary argues that the judgment and memorandum are inconsistent. Since the judgment and *memorandum and order* were amended on July 22, 1980 to correct *any* inconsistencies, the Court also rejects this argument.

Based on the foregoing, plaintiff's motion to alter or amend the judgment or, in the alternative, to stay the judgment must be and is hereby denied.

SO ORDERED this 11th day of August, 1980, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARCH 29, 1979

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

This is a simple case, factually. The government, through one Walter C. Brey, wishes to inspect defendant's quarry pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-960. To illustrate the dangers of a quarry, the government points to the death of Douglas J. Bartell, who "was killed on September 16, 1975 when he was buried in a mixture of gravel and limestone" at defendant's site. (Brey Affidavit).

Mr. Brey inspected defendant's location on September 17, 1975 and issued two notices of violations of safety standards. On April 25, 26 and 27 of 1978, Mr. Brey conducted a follow-up safety and health inspection at which time 25 citations were issued for violations of mandatory health and safety standards. Then, on July 10, 1978, Mr. Brey returned to make another inspection in order to determine whether defendant had corrected one problem, namely the exposure to silica-bearing dust by an employee bagging lime. Defendant refused to permit Mr. Brey to conduct a search and demanded he obtain a valid search warrant prior to inspection.

The government in this action is seeking a preliminary injunction enjoining defendant from refusing to permit inspection of its mines. The sole issue presented by this action is whether the Federal Mine Safety and Health Act, as applied to quarries, permits the government through the Secretary of Labor to conduct warrantless searches.

In order to grant a preliminary injunction, four prerequisites must be met: (1) plaintiff must show that he has no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) that the plaintiff has a reasonable likelihood of success on the merits; (3) that in granting the preliminary injunction, the Court will not disserve the public interest; and (4) that any threatened injury to the plaintiff outweighs the injury the injunction may cause the defendant. *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976). Furthermore, plaintiff has the burden of persuasion on all of these prerequisites. *Id.*

Although all four elements must be overcome before a preliminary injunction will issue, in this case particular emphasis must be placed upon the second element, namely plaintiff's likelihood of success on the merits. The key decision bearing on this case is the Supreme Court's holding in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) wherein the Court held that the Occupational Health and Safety Act (OSHA) did not permit the government to conduct warrantless searches.

In ruling on the issue presented in *Barlow's*, the Supreme Court held that there are exceptions to the search warrant requirements, *e.g.*, those businesses subject to close supervision or regulation. *United States v. Biswell*, 406 U.S. 311, 316 (1972) and *Colonnade Catering Corp., v. United States*, 397 U.S. 72, 74, 77 (1970). In discussing why warrantless searches are permitted in certain industries (*e.g.* liquor and firearms) the Court stated "when an entrepeneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. at 313. In further elucidating the limited class of searches in which a warrant is not required the Court held

"The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.*

The only conclusion that can be drawn from reading the Court's decision in *Marshall v. Barlow's, Inc., supra*, is that warrantless searches are only permissible in extremely narrow circumstances. In reviewing the facts of the present case, this Court is drawn to the conclusion that the Federal Mine Safety and Health Act of 1977, as applied to quarries, does not permit the Secretary of Labor to conduct warrantless searches.

First, the Federal Coal Mine Health and Safety Act of 1969 was only amended to cover mines other than coal mines in 1977 by Public Law 95-164. The Act as applied to other mines did not even become effective until March 9, 1978. Therefore, the long continuous regulation mentioned by the Supreme Court is absent. Secondly, the Secretary does not describe any unusual circumstances in the quarry type of businesses to necessitate a warrantless search.

Plaintiff cites *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) for the proposition that warrantless searches in mines are permissible. First, that case dealt with underground coal mines rather than quarries; second, that case was decided prior to *Marshall v. Barlow's, Inc., supra*, and thus that case must be placed in the balance. With these distinctions in mind, the Court does not find that a warrantless search is justified in this case, even assuming that *Youghiogheny* is correct.

Therefore, since the Secretary of Labor has failed to show a reasonable likelihood of success on the merits, his motion for a preliminary injunction must be and hereby is denied.

Defendants have requested the Court, however, to issue a preliminary injunction in its favor. Defendants express the fear that the government will try further warrantless searches and then issue citations to defendants for their refusal. Defendants' request must be denied at this time.

The government has represented to the Court that it will not pursue any warrantless searches. If the government does attempt to conduct searches and issues citations, the Court stands ready to reconsider defendant's request. At this time, the irreparable harm element is absent.

Therefore, plaintiff's petition for a preliminary injunction must be and hereby is denied. Furthermore, defendant's request for a preliminary injunction is also denied.

SO ORDERED this 29th day of March, 1979, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MAY 30, 1979

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

On March 9, 1979, an oral hearing was held on plaintiff's motion for a preliminary injunction, and based upon oral argument and written briefs, the Court denied plaintiff's motion. The Court's opinion, which was read into the record on March 9, 1979, was put into written form and signed on March 29, 1979. Plaintiff has moved for reconsideration, claiming that the Court erred when it held that quarries were not pervasively regulated industries.

In the present case, plaintiff seeks to enjoin defendant from refusing to permit plaintiff to conduct inspections without warrants. Of course warrantless searches are ordinarily impermissible. However, the Supreme Court has recognized that in certain limited circumstances, warrantless searches are permitted. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). In *Barlow's*, the Supreme Court articulated why warrantless searches are permissi-

ble in certain industries (*e.g.*, liquor and firearms) by stating "when an entrepeneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." The court further stated "the element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, Inc.*, 436 U.S. at 313. The question presented in the present case is whether the stone quarry industry is pervasively regulated.

The Court would note that the first federal statute regulating stone quarries was the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et. seq.*, enacted by congress in 1966. This legislation is discussed in S. Rep. No. 1296, 89th Cong., 2d Sess. 2, reprinted in [1966] U.S. Code Cong. & Ad. News 2846. In that report, it is pointed out that in 1961 Public Law 87–300 was passed authorizing the Secretary of the Interior to conduct a study of state mine safety laws and the health hazards of mines. Apparently this report, attached as an appendix to plaintiff's brief, formed the basis of the 1966 legislation. The Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et. seq.* was succeeded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* The latter act, specifically 30 U.S.C. § 813(a), permits warrantless inspections.

Regulation of stone quarries by the federal government, therefore, commenced in 1966. Prior to the federal laws, some of the several states regulated mines, but in a haphazard and ineffective manner. The federal legislation passed in 1966, as reflected by Senate Report 1296, was aimed at comprehensive regulation.

In this Court's opinion, the tradition of pervasive regulation of the stone quarry industry did not commence until 1966. The survey conducted pursuant to Public Law 87–300 shows loose and at times non-existent regulation of stone quarries prior to the federal regulation enacted in 1966. Several federal district courts have found that the mining industry, *i.e.*, gravel quarries and the like, is per-

vasively regulated such that warrantless inspections are permissible. *Marshall v. The Texoline Co.*, No. 4-78-49 (N.D. Texas, Mar. 23, 1979); *Marshall v. Nolichucky Sand Co.*, No. 2-78-108 (E.D. Tenn. Dec. 14, 1978); *Andrus v. Magma Copper Co.*, No. 77-765 (D. Ariz. Jan. 16, 1978). In an action brought before Chief Judge Reynolds of this district, he found that the plaintiff had not shown that the stone quarry industry was pervasively regulated and thus he denied plaintiff's motion for a preliminary injunction. *Marshall v. Halquist Stone Co.*, No. 78-C-463 (E.D. Wis. Sept. 15, 1978).

The fourth amendment to the United States Constitution means what it says. Notwithstanding the Supreme Court having noticed several exceptions to the warrant requirement, in this Court's opinion, the pervasive regulation of the type found in the liquor industry, *e.g.*, had not existed until congress entered the field. Such late entry cannot meet the requirements set forth in *Barlow's*, *supra*.

Having reviewed the materials submitted by plaintiff, being aware of the flexible nature of the requirement that plaintiff must make a showing of "reasonable success of the merits," *Mullis v. Arco Petroleum*, 502 F.2d 290, 293 (7th Cir. 1974), and cognizant of "the presumption of constitutionality to which every duly enacted state and federal law is entitled . . .," *Lockport v. Citizens of Community Action*, 430 U.S. 259, 272 (1977), the Court, on reconsideration, must deny plaintiff's motion for a preliminary injunction. Plaintiff has not made the necessary showing under *Fox Valley Harvestore, Inc.* v. *A.O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976).

SO ORDERED this 30th day of May, 1979, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed SEPTEMBER 9, 1980]

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE COMPANY, DEFENDANTS.

NOTICE OF APPEAL

NOW COMES the Plaintiff Secretary of the United States Department of Labor by his attorneys and gives notice pursuant to 28 U.S.C. § 1252 of his appeal to the Supreme Court of the United States from the decision and judgment entered in this action on July 15, 1980 as amended July 22, 1980 and from the order of August 11, 1980 denying the plaintiffs motion to alter, amend, or stay judgment.

Dated at Milwaukee this 10th day of September, 1980.

JOAN F. KESSLER
United States Attorney

By: /s/ _____
CHARLES H. BOHL
Assistant United States Attorney

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